

# **Pandemic Preparedness**

## **Legal Consultation Workshop**

**October 12, 2007**

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A Survey of Michigan Emergency  
Management Laws During a Health Crisis

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# Legal Disclaimers

(void where prohibited, no purchase necessary...)

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- Not Opinion of Attorney General Cox
- Consult Your Counsel for Specific Questions
- How to Secure Formal Attorney General Opinion



# Constitution

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## Amendment X-

“The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people.”

“Police Powers”



# Refers to the State's Inherent and Inherited Residual Power

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- The police power of the state extends to the protection of the lives, health, and property of the community against the injurious exercise by any citizen of his own rights."  
*Patterson v Kentucky*, 24 L Ed 1115 (1879)
- "A social emergency..., so grave as to constitute a serious menace to the health, morality, comfort, and even the peace of the people of the state, would sustain a resort to the police power..."  
*Levy Leasing v Siegel*, 66 L Ed 595 (1922)



# The State's Emergency Powers

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A. Emergency powers are usually found in state or federal Emergency Management Statutes and are intended to maximize the Government's ability to respond to natural or man-made emergencies.

“Emergency Powers are the gold standard when it comes to emergency response, in terms of the authority they provide.”



# Review of 1976 PA 390

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- Preamble-Purpose of Law
- Section 2–Definitions
  - Key definitions:
    - Chief Executive
    - Disaster vs Emergency



# Section 3-The Governor's Emergency Powers

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Michigan Emergency Management Act, 390 of 1976, MCL 30.401, et. seq.

Section 3. Allows Governor to proclaim a state of disaster or emergency and to issue orders "having the force and effect of law" to protect life and property.



# Proclamation Elements

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1. Finding of state of emergency or disaster;
2. Not to exceed 28 days, unless approved by resolution by both Houses of the Legislature;





## Proclamation Elements, con't.

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3. Indicate specific nature of emergency or disaster, area(s) threatened, conditions causing the disaster, emergency or heightened state of alert, and the conditions permitting the termination of the state of disaster, emergency, or heightened state of alert;
4. File with Secretary of State.



# Governor's Emergency Powers

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Sec. 5. (1) In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or a state of emergency do 1 or more of the following:



## Governor's Emergency Powers, con't.

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(a) Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business . . .

(b) Utilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency."



## Governor's Emergency Powers, con't.

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(c) Transfer the direction, personnel, or functions of state departments, agencies, or units thereof for the purpose of performing or facilitating emergency management.

(d) [C]ommandeer or utilize private property necessary to cope with the disaster or emergency.



## Governor's Emergency Powers, con't.

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(e) Direct and compel the evacuation of all or part of the population from a stricken or threatened area...

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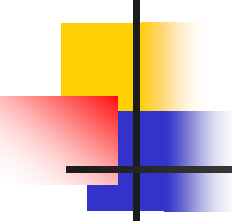
(g) Control ingress and egress to and from the stricken area, removal of persons within the area, and the occupancy of premises within the area.



## Governor's Emergency Powers, con't.

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(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles.



# Examination of 1976 PA 390, con't

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- Section 4-Effect of Executive Order or Proclamation
- Section 6-Personal Obligations, Compensation, record
- Sections 7, 7a-Powers and Duties of Director of MSP/EMD, Division
- Sections 8, 9-Emergency Management Coordinators, State and Local
- Sections 10- Local Powers



# Examination of 1976 PA 390, con't

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- Section 11-Powers and Duties of disaster relief workers
- Section 12-Local Emergencies
- Section 16-Presidential Declarations
- Section 17-Construction of Act 390
- Sections 18,19-Disaster Contingency Fund



# Sec 21-Heightened State of Alert



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- Heightened State of Alert, added by 2002 PA 132, “good cause to believe that terrorists...are within this state or that acts of terrorism may be committed in this state...”
- Allows Governor to issue proclamation in order to “safeguard the interests of the state”, “prevent or respond to acts of terrorism”, or “facilitate the apprehension of terrorists”



## Heightened State of Alert, con't.

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- Same powers as with state of emergency or disaster, except:
  - cannot suspend statute, rule, or order
  - cannot commandeer private property
  - cannot suspend or limit sale of alcohol

Heightened State of Alert can extend for up to 60 days.



# Emergency Executive Orders

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- Limited only by the nature of the disaster, emergency, or heightened state of alert, due process requirements, and the needs and imagination of responders.



## Emergency Executive Orders, con't.

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(2) A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of misdemeanor. (MCL 30.405)



# Federal Assistance

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- Federal assistance is technically a grant
  - Subject to all the requirements of federal grants
  - Therefore, requesting agency must be prepared to document:
    - Activities of emergency personnel
    - Uses of supplies and equipment
    - Expenses



# Stafford Act Declarations

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- Stafford Act requires a Presidential declaration of an emergency or major disaster in a specified county in which costs are incurred



# Stafford Act, con't

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- **Eligible “Emergency Measures”**
  - Overtime costs for public health and emergency management personnel
  - Police overtime, National Guard mobilization
  - Equipment, supplies purchase/lease
  - Provision of emergency medical care
  - Communication costs (hot lines)
  - “But For Test”-costs are eligible only if caused by the event



# Stafford Act, con't

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- **If major disaster declared, additional funds for:**
  - Public assistance-funding for 75% of cost of repair. Reconstruction, replacement of public facilities
  - Crisis counseling, unemployment assistance, food stamps
  - Includes non-profit medical facilities





# Stafford Act, con't

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- **What's not covered?:**
  - Lost revenue, lost wages
  - Losses to for-profit businesses
  - Losses reimbursable from insurance or another source (need to capture info from patients, etc)
  - Reimbursement only if performed under a contract by an eligible government or non-profit applicant
  - SBA disaster loans available to businesses



# Mutual Assistance

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- **Key Characteristics:**
  - Generally by written agreement that cover:
    - Activation Procedures
    - Liability, employment and compensation issues
    - Federal reimbursement
    - Voluntary, not guaranteed
    - Compensated vs Donated services
    - Covers use of equipment



## Mutual Assistance, con't.

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1. Supplies: food, clothing, medicine, etc.
2. Engineering services
3. Emergency housing
4. Police services
5. Services of National Guard
6. Health, medical, and related services
7. Fire fighting, rescue, transportation, and construction services and equipment.
8. Other necessary equipment, facilities, and services.



# Intrastate Mutual Assistance

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- At least 27 states have some form of intrastate management compact.
  - Michigan MEMAC
  - Most communities have operational agreements for day to day cooperation.



# Mutual Assistance, con't

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Section 4(3): “The governor may, with the approval of the state administrative board, enter into a reciprocal aid agreement or compact with another state, the federal government, or a neighboring state or province of a foreign county.”



# Mutual Assistance-EMAC

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2001 PA 247 – Interstate Emergency Management Assistance Compact – Equipment

2001 PA 248 – Interstate Emergency management Assistance Compact – Personnel

Approved by Congress in 1996 and all 50 states



# EMAC, con't

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- **Triggering Mechanism**

- State Declaration of Emergency
- Request for assistance made by Governor of member State
- Request routed to Governors of other member states to fulfill assistance



# EMAC, con't

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- Requesting state pays cost (labor, material, contractors, etc) to responding state
- Federal Government will reimburse costs paid to responding state if:
  - President declared an emergency under Stafford Act and
  - Costs are eligible “emergency measures”





# EMAC, con't

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2001 PA 247, 248-

Article V provides:

“Whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is required ... such person shall be deemed licensed, certified, or permitted ... to render aid involving such skill to meet a declared emergency or disaster, ...”



# EMAC, con't.

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## **But:**

- Subject to legislative appropriations
- Article I, Sec. 10 of the Constitution

“No state shall, without the consent of Congress ... enter into any agreement or compact with another state, or with a foreign power...”

**Probably not** a problem with regard to interstate mutual aid compacts. Clause only directed at agreements that increase the political power of the states or encroach or interfere with the powers of the United States.

*See: United States Steel Corporation v Multi-State Tax Commission, 434 US 452 (1978).*

**But--**does apply to agreements with foreign countries, i.e., Canada.

*See: Holmes v Jennison, 39 US 540 (1840).*



# Other Mutual Aid issues

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- Liability and immunity
- Cost responsibility
- Command and Control
- Workers Compensation- strict liability vs protection from liability (use of co-employer doctrine)
- Dispute Resolution
- Out of State/Deployment Insurance Coverage



# Local Emergency Power

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- Chief Executive Official of county or municipality, upon declaration of an emergency, may issue travel restrictions on county or local roads. (MCL 30.410)
  - *Walsh v City of River Rouge*, 385 Mich 623 (1971)
- Declaration triggers mutual assistance, state declaration, funding, etc



# Local Emergency Declaration

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- (10) EMA provides that a county or municipality may declare a local state of emergency “if circumstances within the county or municipality indicate that the occurrence or threat of widespread or severe damage, injury, or loss of life or property...exists...” (MCL 30.410)



# Federal Legal Considerations

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- During an emergency, certain federal laws need to be considered.
- Emergency Conditions may Cause inadvertent violations that may later be waived, but....



# Federal Considerations, con't

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- EMTALA-Emergency Medical Treatment and Labor Act, 42 USC 1395dd, requires Medicare participating providers to:
  - Screen any patient appearing in an emergency room.
  - Stabilize patient before transferring or discharging.
  - Penalty-damages, loss of Medicare eligibility.
  - HHS may waive EMTALA during a declared emergency-even retroactively (but still cannot discriminate based on ability to pay).





# Federal Considerations, con't

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- Health Insurance Portability and Accountability Act (HIPAA)
  - Applies to health providers, payment plans, information clearinghouses.
  - Unauthorized disclosure of patient information is subject to civil and criminal penalties.



# Federal Considerations, con't

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- HIPAA exceptions:
  - Consent
  - Required by law (i.e. mandatory disease reporting laws)
  - To government medical examiner
  - Pursuant to court or administrative order
  - To help locate missing person
  - Re: crime victims



# Federal Considerations, con't

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- Non-Paid temporary Federal Employee, 42 USC 5159(b)
  - Federal governmental immunity
  - Subject to Federal Tort Claims Act, fed'l court, no punitive damages)
  - No personal liability, suit vs US only
  - US Gov't Workers Comp coverage
  - 30-60 day per 12 month period
  - No reemployment protection



# Federal Considerations, con't

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- Temp Fed'l Employee -can also be deemed "intermittent disaster response personnel" under the National Disaster Medical System (NDMS), 42 USC 300hh-11(d)(1).
  - Provides a federal license waiver.
  - Under either, "volunteer" employee may be compensated by non-federal source.
  - Generally requires a Volunteer Services Agreement (VSA) with deploying state.
  - Deemed "service in uniformed services" for reemployment purposes, 42 USC 300hh-11(e)(3).



# Role of the Judiciary

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- 1. Courts needed to enforce statutes, orders, and act as a neutral arbiter.
- 2. Essential to maintain public confidence in “rule of law”.



# Judicial Preparedness

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- Who will be the judge?
- Where will court be held?
- How will record be made?
- How will appeals be processed?
- Are court personnel protected?
- Are judges knowledgeable in emergency and public health law?



# Documentation of Actions

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- Make record as you go
- Assign recordkeeping responsibilities
- Use video, photos to preserve government point of view

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## Governor Refuses Blame in 35 Hurricane Deaths

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Doug Mills/The New York Times

A hallway at St. Rita's Nursing Home after Hurricane Katrina two years ago.

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# Blanco to testify in St. Rita's trial today

Prosecutors shift plan, call governor first

Tuesday, August 28, 2007

By Paul Rioux

ST. FRANCISVILLE -- In a pre-emptive legal strike in the St. Rita's nursing home trial, prosecutors announced Monday they will call Gov. Kathleen Blanco to the witness stand today, after having failed to prevent the defense from doing just that in a series of appeals that went all the way to the state Supreme Court.


The court recently upheld a subpoena issued by defense attorneys seeking to question Blanco to bolster their contention that the government is largely to blame for the drowning deaths of 35 residents at the St. Bernard Parish nursing home during Hurricane Katrina.


By calling Blanco as their own witness, prosecutors will get to question her first to try to mitigate the effect of what will surely be a less sympathetic line of questioning by defense attorneys.

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Blanco's attorneys have said the subpoena marked the first time a Louisiana governor had been compelled to involuntarily testify in a criminal case.

**Nursing Home Owners Acquired in Deaths**

ST. FRANCISVILLE, La. (AP) — The names of a Catholic nursing home's owners were revealed early in a criminal case Monday in St. Francisville, La., as prosecutors sought to question the governor.

**Associated Press**

The above story is based on information from the Associated Press. The Associated Press is not responsible for errors or for any consequences arising from the use of the information.

Blanco to testify in St. Rita's trial today- NOLA.com Page 1 of 1

## Nursing Home Owners Acquitted in Deaths

By ADAM NOSSITER  
Published: September 8, 2007

NEW ORLEANS, Sept. 7 — The owners of a suburban New Orleans nursing home were found not guilty of negligent homicide Friday in the drowning of 35 of the home's residents in the only trial to result from deaths in Hurricane Katrina.

### Hurricane Katrina

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The three-week trial of the owners, Salvador Mangano, 67, and his wife, Mabel, 64, recounted the deadliest

single episode of the storm that continues to haunt this region, and it was punctuated with tearful testimony from relatives of victims and forceful depictions of government ineptitude by the Manganos' lawyers.

Many of those who died were bedridden, trapped when the waters rose over coastal St. Bernard Parish after the hurricane passed through. The nursing home, St. Rita's, was inundated, and many of those who survived floated to safety only because their mattresses were coated in plastic.

The six-member jury in St. Francisville, 100 miles north of here, acquitted the Manganos after four hours of deliberation. The trial was moved because only a fraction of St. Bernard Parish's residents have returned.

The defense tried to put the blame on the state and federal governments, saying no one would have died if the levees had not failed, if the state had ordered an evacuation or if officials had employed a plan to take charge of nursing homes in an emergency.

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Community Health and the Centers for  
Disease Control and Prevention



# Summary and Conclusion

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- Questions?
- See [www.michigan.gov/ag](http://www.michigan.gov/ag)

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